WUWC
WESTERN URBAN WATER COALITION

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RE: Comment on the "Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program Is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation," 85 Fed. Reg. 30953 (May 21, 2020), Docket No. EPA-HQ-OW-2020-0008

The Western Urban Water Coalition (WUWC or Coalition) appreciates this opportunity to comment on the U.S. Environmental Protection Agency's (EPA) "Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program Is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation," 85 Fed. Reg. 30953 (May 21, 2020).

WUWC was established in 1992 to address the western United States' unique water supply and water quality challenges that threaten the economic sustainability and growth of the large western population centers. WUWC consists of the largest urban water utilities in the West, who together serve more than 40 million urban water consumers in 18 major metropolitan areas across seven states.[1] Some of these utilities also operate wastewater, natural gas, and electric (including hydroelectric) facilities for their customers. In operating these projects, WUWC members are involved in a number of federal and nonfederal activities that are subject to the Clean Water Act (CWA) and Endangered Species Act (ESA).

[1] **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (Eastern Municipal Water District, Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); **Colorado** (Aurora Water, Colorado Springs Utilities, and Denver Water); **Nevada** (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities); and **Washington** (Seattle Public Utilities). Seattle Public Utilities does not join in this comment letter.

WUWC has previously submitted comments on rulemakings with regard to ESA Section 7 consultation, and in 2007, WUWC filed an amicus brief[2] in *National Associations of Home Builders v. Defenders of Wildlife* (*Home Builders*), 551 U.S. 644 (2007), in support of petitioner EPA's position that the transfer of CWA National Pollutant Discharge Elimination System (NPDES) permitting authority to a state is not discretionary and, therefore, does not trigger ESA Section 7(a)(2)'s consultation and no-jeopardy requirements. EPA has taken a similar position regarding the applicability of ESA Section 7(a)(2) to the transfer of CWA Section 404 dredged and fill permitting authority to a state or tribe. In this comment letter, WUWC reiterates the position it took in its amicus brief in *Home Builders*. WUWC supports EPA's current interpretation of its non-discretionary duty to transfer CWA Section 404 permitting authority to states and tribes and opposes reconsideration of that position.

A. General Comments

WUWC has historically been, and will continue to be, a supporter of the goals of the CWA and ESA. In the interest of achieving efficiency in administration of both laws, WUWC strongly supports EPA's position that it does not have discretion to conduct an ESA Section 7(a)(2) consultation with the Fish and Wildlife Service (FWS) when considering a state or tribal CWA Section 404 program request.

WUWC members devote considerable resources to meet growing water demands in the western United States, including building the most cost-effective and efficient systems. The dredged and fill program is essential to many WUWC members facing the replacement of century-old water and wastewater infrastructure that is past its useful life. WUWC's commitments depend on stability and certainty in the regulatory process. Requiring ESA Section 7 consultation during the transfer of CWA Section 404 authority to states and tribes will likely impact the efficiency with which states can assume the Section 404 permitting program. To avoid negative consequences, EPA should maintain its current interpretation of CWA Section 404.

WUWC members, experienced with the unique challenges facing the western states, offer the following additional comments.

B. Specific Comments

ESA Section 7(a)(2) consultation is limited to those federal actions that are "discretionary" under 50 C.F.R. § 402.03 and where the federal agency's actions are the direct cause of effects to listed species or their critical habitat. Because EPA's CWA Section 404 transfer duty is non-discretionary and does not directly cause effects to listed species or their critical habitats, ESA Section 7(a)(2) does not apply.

Below, WUWC addresses EPA's non-discretionary duty. WUWC also responds to arguments raised in a white paper submitted to EPA by the Florida Department of Environmental Protection

[2] Brief Amicus Curiae of Western Urban Water Coalition, *Nat'l Ass'ns of Home Builders v. Defenders of Wildlife* (*Home Builders*), Nos. 06-340, 06-549 (U.S. Feb. 20, 2007).

(FDEP),[3] because EPA has requested public comment based in part on the positions articulated in the white paper.

1. EPA's duty to transfer 404 permitting authority is non-discretionary.

CWA Section 404 requires EPA to approve state and tribal requests to assume the dredged and fill permitting program if listed statutory criteria are met. The plain language of Section 404 makes clear that EPA does not have authority to reject a state or tribal request for assumption of the program where the state or tribe has met the statutory requirements. Where federal agencies have a non-discretionary duty to act, as EPA does under CWA Section 404, ESA Section 7(a)(2) does not apply. *Home Builders*, 551 U.S. at 644.

In *Home Builders*, the Supreme Court held that the consultation duty of ESA Section 7(a)(2) "covers only discretionary agency actions and does not attach to actions . . . that an agency is *required* by statute to undertake once certain specified triggering events have occurred." *Id.* at 669. In that case, the Court addressed the interplay between ESA Section 7(a)(2) and CWA Section 402(b), under which EPA "shall approve" a state NPDES program if the state has demonstrated that it has the authority to carry out Section 402(b)'s list of nine enumerated statutory criteria. 33 U.S.C. § 1342(b). First, the Court noted that Congress' use of a mandatory "shall" "'impose[s] discretionless obligations'" upon the agency. *Home Builders*, 551 U.S. at 661 (quoting *Lopez v. Davis*, 531 U.S. 230, 241 (2001)). Further, the Court found that the list of criteria under Section 402(b) is *exclusive*. Thus, "if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application" and, therefore, EPA's duty under Section 402(b) is not subject to ESA Section 7(a)(2) consultation. *Id.*

Although the Court in *Home Builders* addressed a different provision under the CWA – Section 402 – the case has informed EPA's interpretation of CWA Section 404, and for good reason. Like Section 402, the Section 404 language related to state dredged and fill programs is set forth in the clearest of mandatory terms: EPA "shall approve" the state's application to transfer the permitting program if the state has met the criteria set forth in § 404(h)(1); it "shall . . . notify" the state if corrective action is needed; and, if corrective action is not taken, EPA "shall . . . withdraw approval of such program." 33 U.S.C. § 1344(h), (i). Section 404's list of statutory criteria is exclusive and, like the list under Section 402, the criteria "all relate to whether the state agency that will be responsible for permitting has the requisite authority under state law to administer" the dredged and fill program. *Home Builders*, 551 U.S. at 650-51.

a. EPA's obligation to determine whether the state or tribe has adequate authority to apply and assure compliance with the substantive requirements of the ESA does not trigger consultation under ESA Section 7(a)(2).

As EPA explained in its December 27, 2010 letter to ECOS and ASWM,[4] there are a number of important safeguards in the CWA and EPA's regulations which ensure that endangered species issues are addressed in state permitting programs. One such safeguard is the criterion listed under Section 404(h)(1)(A)(i). Contrary to FDEP's claims presented in its white paper, that provision

[3] https://www.regulations.gov/document?D=EPA-HQ-OW-2020-0008-0008.
[4] https://www.regulations.gov/document?D=EPA-HQ-OW-2020-0008-0002.

does not transform EPA's Section 404 transfer duty into a discretionary obligation subject to ESA Section 7(a)(2) consultation.

The FDEP argues in its white paper that Section 404(h)(1)(A)(i), which lists one of the criteria a state must meet for Section 404 permitting authority, requires EPA to conduct an ESA Section 7(a)(2) consultation. However, that provision merely requires EPA to ensure that the state has authority to issue permits which "apply, and assure compliance with . . . the guidelines established under [the Section 404(b)(1) Guidelines]." 33 U.S.C. 1344(h)(1)(A)(i). The Guidelines prohibit the permitting of the discharge of dredged or fill material if it "[j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in the likelihood of the destruction or adverse modification of . . . critical habitat." 40 C.F.R. § 230.10(b)(3). The Section 404(h)(1)(A)(i) criterion does not, as FDEP argues, give EPA authority to take part in an ESA Section 7(a)(2) consultation; instead, it requires EPA to determine whether the *state* has the authority to issue permits which apply, and assure compliance with, the Section 404(b)(1) Guidelines.

Once permitting authority is transferred to a state, the state must "exercise that authority under continuing federal oversight to ensure compliance with relevant mandates of the Endangered Species Act and other federal environmental protection statutes." *Home Builders*, 551 U.S. at 649-50. Nothing in Section 404(h)(1)(A)(i) places a burden on EPA to conduct an ESA Section 7(a)(2) consultation during its consideration of a state's request for transfer of permitting authority.

EPA's characterization of this criterion as a "safeguard" – ensuring that the state has the ability to address endangered species issues if it receives Section 404 permitting authority – is the correct interpretation.

b. EPA's obligation to consider comments submitted by FWS also does not trigger consultation under ESA Section 7(a)(2).

Under CWA Section 404, EPA must provide "the Secretary of the Interior, acting through the Director of [FWS]" an opportunity to comment on a state application for assumption of the CWA Section 404 program. 33 U.S.C. § 1344(g)(2), (3). EPA also must "tak[e] into account any comments submitted by … the Secretary of the Interior, acting through the Director of the [FWS]." 33 U.S.C. § 1344(h)(1). As Congress explained, the involvement of the FWS serves to provide EPA with additional expertise when determining whether a state meets the criteria for assumption of Section 404 permitting authority.[5] It does not, as FDEP claims, transform EPA's transfer duty into a discretionary action requiring ESA Section 7(a)(2) consultation simply because the FWS is the agency responsible for the implementation of the ESA and its consultation requirements.

[5] https://www.regulations.gov/document?D=EPA-HQ-OW-2020-0008-0011 at 24 (S. Rep. 95-370 (1977), 95 Cong. Senate Report 370; CWA77 Leg. Hist. 20) ("The committee amendments relating to the Fish and Wildlife Service are designed to (1) recognize the particular expertise of [FWS] and the relationship between its goals for fish and wildlife protection and the goals of the [CWA], and (2) encourage the exercise of its capabilities in the early stages of planning.").

Further, FWS' involvement in EPA's review of a state's Section 404 permitting program is optional, and a state's permitting program can be approved without consideration of FWS' comments. If EPA's transfer of Section 404 permitting authority was subject to ESA Section 7(a)(2) consultation, as FDEP argues, FWS' involvement would not be optional.

Under CWA Section 404, if FWS chooses to submit comments, it must do so within 90 days of EPA's receipt of the state's application; however, the agency is not required to submit comments at all. 33 U.S.C. § 1344(g)(2), (3). Even if FWS does submit comments, it is possible that the state program automatically would be approved without EPA's consideration of those comments due to EPA's failure to make a determination on the program within the 120 days provided by the statute. *Id.* § 1344(h)(1). In that case, the program would be approved without a final determination from EPA and without any consideration of FWS' comments. *Id.* § 1344(h)(3).

c. Legislative history supports EPA's current interpretation of its non-discretionary duty under CWA Section 404.

In addition to the similar statutory structures of CWA Sections 402 and 404, the legislative history of Section 404 also supports EPA's interpretation of its non-discretionary authority under both provisions. When amending the CWA in 1977, Congressman Ray Roberts noted the following:

> The authority which the State must have in order for the [Section 404] program to be approved by the Administrator is essentially the same authority it must have to administer a 402 permit program. If, with respect to a State program, the Administrator determines that the State has the requisite authority to carry out the program he shall approve the program and notify the Secretary who shall suspend the issuance of permits for activities covered by the State program.[6]

In other words, Congress determined that, under Section 404, a state must have "*essentially the same authority*" as it does under Section 402 and, in the event that the state has that authority, EPA "shall approve" the program. A 1977 Senate Report similarly found that the criteria and guidelines for state assumption of the Section 404 permit authority were "comparable to those contained in 402(b)."[7] During the enactment of Section 404, Congress expressly acknowledged the similarities between Sections 402 and 404 and, more importantly, highlighted the non-discretionary nature of EPA's duty to approve a state Section 404 permitting program.

Although a Senate Report refers to EPA's "discretion" to address FWS' comments on a state Section 404 permitting program, it is clear that Congress did not intend the fleeting use of that word to impose an additional obligation on EPA during its review of a state 404 program.[8]

First, at the time Congress discussed EPA's review of FWS comments on a state program, it did not consider ESA Section 7(a)(2), because that provision did not yet exist. Second, it would be unreasonable to extend EPA's "discretion" in how it addresses FWS' comments to EPA's duty to

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[6] https://www.regulations.gov/document?D=EPA-HQ-OW-2020-0008-0011 at 4 (House Agreement to Conference Report on H.R. 3199 (1977), 95 Cong. House Debates 1977; CWA77 Leg. Hist. 13, Statement of Mr. ROBERTS).
[7] *Id.* at 24.
[8] *Id.* at 26.

approve or deny a state Section 404 program. If Congress intended for EPA to have discretion to consider criteria outside those listed in CWA Section 404(h)(1), it would have said so. Instead, Congress crafted statutory language that *requires* EPA to approve a state Section 404 program if the state has the requisite authority under CWA Section 404(h)(1). The Supreme Court has explained that EPA "may exercise some judgment" in determining whether a state has demonstrated that it has met the statutory criteria, but that does not give EPA "discretion to add another entirely separate prerequisite." *Home Builders*, 551 U.S. at 671.

Both Congress and EPA have recognized the similarity between EPA's mechanical, criteria-based transfer duty under CWA Sections 402 and 404. To read into Section 404 a requirement that EPA engage in Section 7(a)(2) consultation would effectively repeal Section 404(h)'s mandate that EPA "shall approve" the transfer of permit authority when the statutory prerequisites, Section 404(h)(1)(A)-(H), are met; it also would contradict the Supreme Court's reasoning in *Home Builders*. 33 U.S.C. § 1344(h)(2)(A); *Home Builders*, 551 U.S. at 646.

2. EPA's transfer of Section 404 authority has no direct consequences on listed species or their critical habitat.

The consultation and no-jeopardy/no-critical habitat destruction provisions of ESA Section 7(a)(2) do not apply to non-discretionary actions, such as EPA's Section 404 mandate, and, in any case, do not apply when a federal action is not the direct cause of any potential harm to protected species.

EPA's transfer of Section 404 authority does not directly cause effects on listed species. In *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court determined that there must be a direct cause-and-effect relationship between the federal action and the prohibited result. *See* 541 U.S. at 767-68. The mere transfer of CWA Section 404 authority has no direct consequences on listed species or their critical habitat.

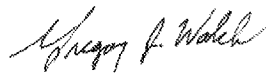
EPA's transfer of its dredged and fill program to states does not affect listed species so as to activate the consultation duty or the prohibitions on jeopardy and critical habitat destruction or adverse modification. ESA Section 7(a)(2) imposes a duty on federal agencies to ensure that species are not jeopardized, and that critical habitats are not destroyed or adversely modified, by actions attributable to the agency. Once administration of the dredged and fill program is transferred, as Congress directed pursuant to CWA Section 404, it is the state, and its administration of its own dredged and fill program, that is directly responsible for the effects flowing from its permitting decisions. A congressional mandate to delegate the dredged and fill program administration to a state does not make EPA responsible for any effects to a species that might occur by virtue of that state's administration of the program. Such effects are not proximately caused by non-discretionary delegation decisions.

C. Conclusion

Based on this extensive background, WUWC supports EPA's current interpretation of its non-discretionary duty under Section 404 and, as such, the inapplicability of ESA Section 7 consultation requirements. Further, WUWC looks forward to continued dialogue regarding EPA's application of its non-discretionary duty to approve or deny state Section 404 programs.

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at 702-258-7166 or greg.walch@lvvwd.com, or the WUWC national counsel, Don Baur at 202-654-6234 or dbaur@perkinscoie.com.

Very truly yours,



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